STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2006
v	No. 263271 Jackson Circuit Court
PAUL ANTHONY ADAMS, Defendant-Appellant.	LC No. 05-000658-FH

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

A jury convicted defendant of second-degree retail fraud, MCL 750.356(D), resisting and obstructing a police officer, MCL 750.81(D)(1), and assault and battery, MCL 750.81. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent terms of 24 to 180 months' imprisonment for second-degree retail fraud, and 30 to 180 months' imprisonment for resisting and obstructing a police officer. However, the court chose not to sentence defendant for the assault and battery conviction.

I. Facts

On the afternoon of February 23, 2005, defendant walked into a Target store, broke into a cabinet, removed three portable DVD players, put them into a bag, and walked toward the store's exit. As defendant approached the door, he saw two security officers quickly approaching him. He then dropped the bag with the stolen goods. After defendant refused to go with the security guards, a physical altercation occurred. The incident ended when defendant sprinted from the store and police later apprehended him.

II. Analysis

A. Prior Convictions

Defendant claims that the trial court abused its discretion when it allowed the prosecution to admit his prior retail fraud convictions. We hold that defendant waived this issue.

Waiver is defined as "the 'intentional relinquishment or abandonment of a known right.'" *People v Carines*, 460 Mich 750, 762-765; 597 NW2d 130 (1999). It differs from forfeiture, which is "the failure to make the timely assertion of a right." *Id.* "One who waives his rights

under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993); *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

When the trial court asked defendant to respond to the prosecution's argument that defendant's prior retail fraud convictions should be admitted for impeachment purposes, defense counsel stated, "well judge, it's my understanding under the Rules of Evidence that – the crimes involving theft and dishonesty that they're impeachable offenses. I'm assuming retail fraud would include that." Thus, defense counsel affirmatively stated that evidence of the prior convictions was admissible. Accordingly, defendant waived any claim of error on this issue. *Carter*, *supra.*

B. Amendment of Charges

Defendant argues that he was denied due process when the charges against him were amended shortly before trial. We review for an abuse of discretion a trial court's decision to grant or deny a motion to amend an information. *People v McGee*, 258 Mich App 683, 686; 672 NW2d 191 (2003). A trial court abuses its discretion if the result is so contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Yost*, 468 Mich 122, 127; 659 NW2d 604 (2003).

The due process clause of the Fourteenth Amendment mandates that whatever charging method the state employs must give the criminal defendant fair notice of the charges against him to permit adequate preparation of his defense. US Const, Am XIV; *Koontz v Glossa*, 731 F2d 365, 369 (CA 6, 1984). This requires that the offense be described with some precision and certainty. *Id*. However, MCL 767.76 provides that a trial court may amend the information at any time before, during, or after trial in order to cure a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime. *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Here, on the first day of trial, the court permitted the prosecution to amend the information to second-degree retail fraud with a felony enhancement. This decision was not an abuse of discretion because, at the preliminary examination, defendant knew that he was facing the charges set forth in the amended information. Indeed, the judge at the preliminary examination stated:

> This constitutes retail fraud in the second degree and the defendant is charged with retail fraud in the first degree. Section 750.356(c)(2) [provides that] "a person who violates section 356(d)(1) retail fraud in the second degree and who commits and has one or more prior convictions." So the retail fraud in the second degree is the offense of theft from $200.00 to $1,000.00, which the price items - - the items priced in this area fall in and he has a prior conviction, so the Court is satisfied that retail fraud in the first degree has been established, or a prima facie case has been established.

The amended information reflected the above statement and the trial court did not prejudice defendant when it allowed the amendment. Further, defendant would have proposed the same defense of abandonment regardless whether the charge was retail fraud for goods worth over

$1,000.00 or goods worth between $200.00 and $1,000.00. And, there was no unfair surprise, inadequate notice, or insufficient opportunity to defend. Accordingly, defendant had "a fair opportunity to meet the charges against him." *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993).

C. Sufficiency of the Evidence

Defendant maintains that the prosecutor presented insufficient evidence to convict him of retail fraud. "In reviewing the sufficiency of the evidence in a criminal case, we must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997).

Larceny is the taking and carrying away property of another, done with felonious intent and without the owner's consent. MCL 750.356; *People v Malach*, 202 Mich App 266, 270; 507 NW2d 834 (1993). Retail fraud in the second degree occurs when a person "while a store is open to the public, steals property of the store that is offered for sale at a price of $200.00 or more but less than $1,000.00." MCL 750.356(d)(1)(b). Someone who "violates section 356(d)(1) and who has 1 or more prior convictions for committing or attempting to commit an offense under this section . . . is guilty of retail fraud in the first degree." MCL 750.356(c)(2).

Defendant does not argue that the prosecution failed to prove a specific element of the crime, but that he abandoned the crime before he left the store. Abandonment is an affirmative defense, and the burden is on the defendant to establish by a preponderance of the evidence that he voluntarily and completely abandoned the criminal purpose. *People v Cross*, 187 Mich App 204, 206; 466 NW2d 368 (1991). The defense, however, is not available if the defendant fails to complete the attempted crime because of unanticipated difficulties, unexpected resistance, or circumstances that increase the probability of detention, detection, or apprehension. *Id*.

The testimony of two security guards, defendant's own testimony, and a video shown to the jury all indicate that defendant only "abandoned" the crime when it became apparent he was not going to get away with it. He dropped the goods when he realized that there was an increased probability of detention, detection, or apprehension. *Id*.

Further, we note that the question of whether an affirmative defense has been established is usually a question for the jury, and any challenge in that regard goes to the weight and not the sufficiency of the evidence. *People v McNeal*, 152 Mich App 404, 415; 393 NW2d 907 (1986). The prosecutor need not initially present evidence regarding an abandonment or lack thereof, but need only prove his case. Here, the prosecution did so with overwhelming evidence.

D. Sentencing Credit

Defendant claims that he was entitled to sentencing credit, against his new sentences, for time he served in jail while he awaited trial. We review de novo whether defendant was improperly denied credit as provided in MCL 769.11b. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997).

Defendant was on parole at the time of his arrest. MCL 791.238(2) provides in relevant part that, "a parolee arrested for a new criminal offense, held on a parole detainer until his conviction, is not entitled to credit for time served in jail on the sentence for the new offense." Credit is granted for time served in jail as a parole detainee, but that credit is only applied to the sentence for which the parole was granted. *Id*. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). The trial court's decision to not credit defendant with time served was justified by the record and complied with the applicable statutes.

E. Presentence Report

Defendant also asserts that he was sentenced on the basis of a presentence report that contained inaccurate information.

If a party fails to raise objections at sentencing, this Court reviews the matter for plain error. *Carines, supra* at 764, 774. To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, meaning the error affected the outcome of the lower court proceedings. *Id.* at 763.

A judge may rely on the information in the presentence report, which is presumed to be accurate, unless the defendant effectively challenges the accuracy of the factual information. *People v Grant*, 455 Mich 221, 233; 565 NW2d 389 (1997). The purpose of a presentence report is to give the trial court as much information as possible so that the sentence can be tailored to the circumstances of the individual defendant. *Morales v Michigan Parole Bd*, 260 Mich App 29, 45-46; 676 NW2d 221 (2003). Further, the presentence report also serves to gather information and its scope must, therefore, be broad. *Id*. A defendant has a right to the use of accurate information; however, if an alleged inaccuracy had no effect on the sentence imposed, the failure to correct information can be harmless error. *People v McAllister*, 241 Mich App 466, 474; 616 NW2d 203 (2000). And, the presentence investigation report may include information concerning defendant's illegal activities even though such activity may not have resulted in defendant being charged or convicted. *People v Claypool*, 470 Mich 715, 730; 684 NW2d 278 (2004).

Defendant only asserts that some of the prior charges listed in the presentence report were vague and unclear. Defendant claims that theses charges should not have been included in the presentence report, but there is no law to support this contention. Beyond these claims of vague charges, defendant makes no showing that the report is inaccurate or that the court somehow improperly relied on defendant's arrest record in fashioning his sentence. Therefore, remand for resentencing is not required. *People v Hall*, 56 Mich App 10, 18; 223 NW2d 340 (1974).

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder